INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional provision involved	2
Statement	2
Reasons for granting the writ	8
Conclusion	20
Appendix A	1a
Appendix B	5a
Appendix C	7a

CITATIONS

Cases:

Costello v. *United States*, 365 U.S. 265	11
Government of the Virgin Islands v. *Gereau*, C.A. 3, No. 73-1775, decided August 15, 1974	17
Jones v. *United States*, 362 U.S. 257	9
Killough v. *United States*, 336 F.2d 929	19
Nardone v. *United States*, 308 U.S. 338	11
People v. *Fitzpatrick*, 32 N.Y. 2d 499, 300 N.E. 2d 139, certiorari denied, 414 U.S. 1050	8, 15, 16, 17
Rouda v. *United States*, 10 F.2d 916	13
Silverthorne Lumber Co. v. *United States*, 251 U.S. 385	11
United States v. *Bacall*, 443 F.2d 1050, certiorari denied, 404 U.S. 1004	14

Cases—Continued

	Page
United States v. *Barrow*, 363 F.2d 62, certiorari denied, 385 U.S. 1001	14
United States v. *Brandon*, 467 F.2d 1008	14
United States v. *Calandra*, 414 U.S. 338	9, 15
United States v. *Carino*, 417 F.2d 117	12
United States v. *Castellana*, 488 F.2d 65	19
United States v. *Falley*, 489 F.2d 33	17, 18
United States v. *Holsey*, 437 F.2d 250	14
United States v. *Hull*, 437 F.2d 1	14
United States v. *Jones*, 457 F.2d 697	14
United States v. *McKlemurry*, 461 F.2d 651	14
United States v. *Paroutian*, 299 F.2d 486	19
United States v. *Scharf*, 421 F.2d 1239	14
United States v. *Seohnlein*, 423 F.2d 1051, certiorari denied, 399 U.S. 913	19
United States v. *Stornini*, 443 F.2d 833	14
United States v. *Viale*, 312 F.2d 595	14
Warren v. *Hawaii*, 119 F.2d 936	19
Wayne v. *United States*, 318 F.2d 205	19
Wong Sun v. *United States*, 371 U.S. 471	9, 10

Constitution and statute:

United States Constitution, Fourth Amendment	2
18 U.S.C. 2	3
21 U.S.C. 841(a)(1)	3

Miscellaneous: Page

Comment Note, *"Fruit of the Poisonous Tree" Doctrine Excluding Evidence Derived from Information Gained in Illegal Search*, 43 A.L.R. 3d 385 (1972) 11, 15

Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. Crim. L., C. & P. S. 307 (1964) 15

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS GRIFFIN AND CATHERINE TUCKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above-captioned case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-4a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 5a-6a) was entered on August 21, 1974. On

September 11, 1974, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including October 19, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence seized pursuant to a valid search warrant should be suppressed as the fruit of an unlawful entry into respondent's apartment made while the warrant was being procured.

2. Whether, assuming the evidence in this case is deemed tainted by illegal entry, it should nevertheless be admissible because its discovery upon the execution of the warrant was inevitable.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Respondents were charged in a three-count indictment filed in the United States District Court for the Eastern District of Michigan with the unlawful possession of heroin with intent to distribute, in

violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. They subsequently filed a motion to suppress tangible evidence seized from respondent Griffin's apartment on December 21, 1972. After hearing testimony and argument and studying the briefs submitted by counsel, the district court orally granted the motion to suppress on August 1, 1973 (Tr. 53) and filed a written order on August 3, 1973 (App. C, *infra*). The government appealed this ruling to the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment of the district court in an opinion filed on August 21, 1974 (App. A, *infra*).

1. During the week of December 11, 1972, the Sheriff's Department of Wayne County, Michigan, notified an agent of the federal Bureau of Narcotics and Dangerous Drugs (BNDD) [1] that a previously reliable informant had advised the Department that "Tommy" Griffin was a major narcotics trafficker, who was distributing heroin from Apartment 202 at 2017 Burlingame, in Detroit, Michigan, and that he was aided in this endeavor by Catherine "Twiggy" Tucker (Tr. 10). The informant also had stated that Griffin was expecting a large shipment of heroin and that when the narcotics arrived, they would either be picked up quickly by Griffin's customers from the Burlingame apartment, or Griffin himself would deliver the narcotics to his customers in his 1967 red Valiant (Tr. 11). According to the affidavit in support of the warrant, Griffin told the

[1] The Bureau of Narcotics and Dangerous Drugs was the predecessor agency to the Drug Enforcement Agency (DEA).

informant on December 20 that the heroin was expected the next day.

On December 21, 1972, shortly before 12:30 p.m., the informant visited Griffin's apartment at 2017 Burlingame, where he observed in the possession of respondent Griffin a large plastic bag containing a quantity of white powder, which Griffin identified as heroin (Tr. 12). According to the affidavit, Griffin also indicated that he was expecting a load of cocaine to arrive the same day and that some heroin already had been distributed. The informant reported to local law enforcement officers what he had been told by Griffin and what he had seen in the apartment. The informant also advised the authorities that on the morning of that day he had spoken on the telephone with "Texas Slim" (a well-known narcotics dealer later identified as George Dudley), who stated that he had picked up some heroin from respondent Griffin at the Burlingame address the previous evening and that he intended to obtain more from Griffin later that day (Tr. 13). Local law enforcement officers, who had been maintaining a surveillance of Griffin's apartment building, later confirmed that a man subsequently identified as Dudley, together with an unknown female, had entered the building and that a short time later the female left in a car registered to another known narcotics dealer, Morris Bivins (Tr. 14).

Shortly thereafter, respondent Griffin and Dudley left the apartment building in the red Valiant, which had previously been identified by the informant as

the delivery vehicle (Tr. 15). The agents then proceeded to the residences of persons identified by the informant as prospective customers, in hopes of finding the red Valiant, intercepting what they thought to be deliveries of heroin, and arresting respondent Griffin and Dudley in possession of narcotics; however, they met with no success (Tr. 15-16). At approximately 3:30 p.m., Griffin and Dudley returned to the Burlingame address; Griffin entered the building, remained for a few minutes and then returned to the car and left with Dudley (Tr. 17). Shortly before 4:30 p.m., one of the surveillance units observed the vehicle and followed it to Dudley's residence, where respondent Griffin and Dudley were arrested (Tr. 18, 20). At the time of the arrests, Dudley had a .44 magnum revolver on his person and Griffin had a .45 caliber semi-automatic pistol in his automobile; but there were no narcotics on the person of either (Tr. 20). According to the affidavit in support of the search warrant, a consent search of Dudley's apartment revealed a bag of heroin in the bedroom.

Because many persons had observed the arrests of Dudley and Griffin and had "evinced a considerable interest in what was happening" (Tr. 20), the agents were concerned that someone would get word back to Griffin's confederates at the Burlingame address and that as a result the narcotics that were there might be removed or destroyed (Tr. 20, 22). This was of particular concern to the agents because the unidentified female who had been seen earlier with

Dudley had not been arrested, and her whereabouts was then unknown (Tr. 23).

One agent was then dispatched to obtain a search warrant for Griffin's apartment, while the other agents returned to the apartment (Tr. 22). At approximately 5:00 p.m., the agents knocked on the door of Griffin's apartment and announced that they were federal agents who wanted to secure the premises while a search warrant was being sought (Tr. 23). After receiving no reply, they repeated the announcement and then forced their way into the apartment and fanned out to see if anyone was present (Tr. 23). While they found no people in the apartment, the agents observed on the dining room table "a cutting board and large quantities of white powder and measuring spoons and strainers" (Tr. 23). The agents did not seize these items, nor did they add their observations to the affidavit then being prepared in support of the search warrant application; indeed, so far as appears from the record, they did not even advise the agent seeking the warrant of these additional facts. No information obtained after the arrest of respondent Griffin was contained in the affidavit submitted to the magistrate who issued the warrant.

At approximately 7:30 p.m., respondent Catherine Tucker returned to Apartment 202, entered with a key and was arrested by the agents then securing the apartment (Tr. 24, 36). She was the only person other than the agents to enter the apartment until approximately 9:00 p.m., when the agent who had

been dispatched to obtain a search warrant returned with the warrant, which had been issued by the magistrate. The agents then conducted a thorough search of the apartment and seized the heroin which they earlier had observed, as well as a pistol, two shotguns, and other evidence.

2. At a hearing on respondents' motion to suppress the seized evidence, the district court found that there were no exigent circumstances sufficient to justify the warrantless entry into Griffin's apartment prior to obtaining the search warrant. The court found that the apartment could have been secured by the agents from the outside without entering the apartment. The court made no findings with respect to the validity of the search warrant or the sufficiency of the showing of probable cause (Tr. 46-53). Accordingly, the motion to suppress was granted (Tr. 53; App. C, *infra*, pp. 7a-8a).

3. On appeal, the government abandoned its argument that exigent circumstances justified the warrantless entry and conceded that the entry was illegal. It based its appeal instead on the theory that the evidence was seized pursuant to the warrant and was thus not the fruit of the illegal entry, and also that the discovery of the evidence was inevitable because the entry and seizure would have occurred as soon as the agents had returned with the warrant. The court of appeals held that, in the absence of exigent circumstances, "the police clearly may not force entry to a home without a search warrant simply because they think they have probable cause to be-

lieve evidence of crime may be found therein" (App. A, *infra*, p. 4a). The court also refused to adopt the "inevitable discovery" doctrine of *People* v. *Fitzpatrick*, 32 N.Y. 2d 499, 300 N.E. 2d 139, certiorari denied, 414 U.S. 1050, holding that it would consider the rationale and applicability of the "inevitable discovery" doctrine only in a case in which the police had a "clear legal right" at some point prior to the actual search to conduct that search (App. A, *infra*, p. 3a).

REASONS FOR GRANTING THE WRIT

This case presents two important and interrelated issues regarding the reach of the exclusionary rule to situations in which a search or seizure pursuant to a valid search warrant or other lawful basis is arguably tainted by illegal police activity. The first issue is whether the "independent source" exception to the "fruit of the poisonous tree" doctrine is inapplicable to a seizure of contraband from a house made after the police have obtained a valid search warrant, because prior to the issuance of the warrant the officers had improperly entered the premises and thereupon observed the contraband in plain view. The second issue is whether, assuming the seizure of the contraband to be a product of the unlawful entry, the evidence should nevertheless be ruled admissible because its discovery pursuant to the valid warrant was inevitable.

This case turns on the interplay between competing policies affecting the administration of the

exclusionary rule: on the one hand, the policy of maximizing the deterrent effect of the rule by applying it wherever the prosecution seeks to use evidence that has been connected in any significant fashion with activity violating the Fourth Amendment; on the other hand, a more restrained application of the rule under which exceptions are recognized in situations in which the marginal deterrent value of the rule is diminished or the connection between the unlawful police conduct and the evidence in question is too remote. The court of appeals adopted the former approach in the instant case, in direct conflict with the tendency in this Court to give greater recognition to the competing interests of society in the admissibility of probative evidence in situations in which the marginal utility of the exclusionary principle is questionable, a tendency reflected in the requirement of standing for assertion of Fourth Amendment claims (*Jones* v. *United States*, 362 U.S. 257, 261), in the preclusion of suppression inquiries at the behest of grand jury witnesses (*United States* v. *Calandra*, 414 U.S. 338), and, most relevant here, in the limitations imposed on the reach of the "fruit of the poisonous tree" doctrine (*Wong Sun* v. *United States*, 371 U.S. 471).

1. In affirming the district court's suppression order, the court of appeals entirely ignored the critical issue whether the evidence was in fact the "fruit" of the concededly unlawful entry into Griffin's apart-

ment,[2] or was instead seized pursuant to a search warrant that was entirely untainted by the unlawful entry. Its decision was thus contrary to controlling decisions of this Court, as well as being in conflict with decisions of other courts of appeals construing the "fruit of the poisonous tree" doctrine. That doctrine, as this Court has clearly explained, does not dictate the exclusion of all evidence that may be touched in some manner by unlawful police conduct, but requires suppression only of that evidence held to be the fruit of the illegal conduct. As this Court said in *Wong Sun* v. *United States*, *supra*, 371 U.S. at 488, the decision to admit or exclude evidence turns on " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' "

The test set forth in *Wong Sun* incorporates at least two exceptions to the requirement that evidence connected in some fashion to illegal police conduct be excluded. The first is the "independent source"

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[2] While we did concede in the court of appeals that there were not sufficient exigent circumstances to justify the warrantless entry into Griffin's apartment, and while we do not contend otherwise here, this was not a case of flagrant disregard by law enforcement officers of constitutional dictates but, at most, a misjudgment as to the sufficiency of the circumstances arising during the course of a fast-breaking investigation to justify a warrantless entry to prevent possible destruction of evidence.

limitation, under which evidence is admitted because it is the product of a concurrent investigative process in no way dependent upon information learned through the illegal official acts. See *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385; *Costello* v. *United States*, 365 U.S. 265, 280. The second is the "attenuated connection" limitation, which operates to allow the admission of evidence when the causal connection between the illegal conduct and the evidence sought to be introduced is so attenuated as to dissipate the taint. See *Nardone* v. *United States*, 308 U.S. 338.[3] It is the first of these that should have been applied by the courts below to support the admission of the heroin and related paraphernalia in this case.

Applying the "independent source" principle to the facts of this case, it becomes clear that the heroin seized from respondent Griffin's apartment should not have been suppressed. The seizure did not result from the unlawful entry without a warrant, but was instead made pursuant to a valid search warrant that was issued on the basis of an affidavit containing facts obtained by law enforcement officers totally independent of the illegal entry. The facts were acquired from information supplied by a pre-

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[3] It has been suggested that "inevitable discovery", discussed at pp. 15-19, *infra*, constitutes a third exception to the requirement that the "fruit of the poisonous tree" be excluded. See Comment Note, *"Fruit of the Poisonous Tree" Doctrine Excluding Evidence Derived from Information Gained in Illegal Search*, 43 A.L.R. 3d 385, 391-392 (1972).

viously reliable informant and from observations and lawful activities of the BNDD agents and local law enforcement officers prior to the illegal entry into the apartment. Although the officers observed narcotics and cutting materials in open view upon their warrantless entry, they did not add these observations to the affidavit, and they awaited the issuance of the search warrant before seizing the evidence. The facts in support of the search warrant having been obtained as the result of an investigation in no way tainted by information learned from the illegal entry, the evidence should have been admitted under the "independent source" limitation on the "fruit of the poisonous tree" doctrine.

Not only is the decision of the court of appeals in this case inconsistent with this Court's explanation of the "fruits" doctrine in *Wong Sun*, but it is in conflict with the application of the doctrine by other courts of appeals, most notably with the decision of the Second Circuit in *United States* v. *Carino*, 417 F. 2d 117, 118-119. There, police had illegally searched an automobile belonging to the defendant, who they suspected had participated in a robbery. During the course of the search a gun was found. The contents of the car were left undisturbed, and the vehicle was placed under surveillance. The officers observed a friend of the defendant enter the car and then emerge carrying a paper bag. When approached by the officers, he fled and eventually discarded the bag during the chase. The bag was re-

covered and found to contain the gun. Carino was prosecuted for illegal transportation of the gun, which was stolen, in interstate commerce. The court upheld the admission of the gun in evidence, citing the language from *Wong Sun* quoted earlier in this petition (see p. 10, *supra*). The court observed that the events that transpired following the illegal search "rendered ineffective and unnecessary any information gained through search of the car by the police and completely freed the evidence, actually presented at the trial, from whatever stigma may have attended anything disclosed by that search" (417 F.2d at 119).

Many years earlier Judge Learned Hand had reached the same conclusion in *Rouda* v. *United States*, 10 F. 2d 916 (C.A. 2), where agents had made an assertedly illegal entry into a building and tasted alcohol found therein. A warrant to search the building for alcohol was then obtained; the affidavit in support of the warrant application relied in part on the observations made during the prior entry of the building. The court held the initial entry lawful; relevant here is its alternative ground for decision that, even if the entry were not lawful, the subsequent search under a warrant was untainted. Judge Hand stated (*id.* at 918):

> At the outset we note that, except for tasting the alcohol, Sassi could have learned, and perhaps did learn, all that he put in the affidavit, while he stood outside. As the affidavit would have equally supported the warrant, without the

> allegation that he tasted the alcohol, the question arises whether it makes any difference even if his entry was unlawful. He gained by it no more than was available to him before entry. It is therefore at best extremely doubtful whether he can be said to be profiting by his unlawful entry, in the sense that the rule requires in order to make the evidence incompetent. * * *

The considerations favoring admission of the evidence in the instant case are, if anything, stronger than in either *Carino* or *Rouda*, since the discovery of the facts constituting probable cause and the initiation of the warrant procedure entirely antedated and were wholly unconnected with the premature entry into the apartment. See also *United States* v. *Stornini*, 443 F. 2d 833 (C.A. 1); *United States* v. *Viale*, 312 F. 2d 595, 602 (C.A. 2). The Court should grant certiorari to resolve this conflict among the circuits.[4]

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[4] The decision of the court of appeals is also at odds with the application given to the "independent source" doctrine in numerous other decisions of the courts of appeals in the analogous situation in which an illegal search uncovers a lead to the evidence under attack or to witnesses, where an independent, lawful source pointed toward the same evidence. See, *e.g.*, *United States* v. *Barrow*, 363 F.2d 62, 65-66 (C.A. 3), certiorari denied, 385 U.S. 1001; *United States* v. *McKlemurry*, 461 F.2d 651 (C.A. 5); *United States* v. *Jones*, 457 F.2d 697, 699 (C.A. 5); *United States* v. *Hull*, 437 F.2d 1, 3-4 (C.A. 5); *United States* v. *Brandon*, 467 F.2d 1008 (C.A. 9); *United States* v. *Scharf*, 421 F.2d 1239 (C.A. 9); *United States* v. *Bacall*, 443 F.2d 1050 (C.A. 9), certiorari denied, 404 U.S. 1004; *United States* v. *Holsey*, 437 F.2d 250, 252 (C.A. 10).

2. An issue of at least equal importance is presented by the court of appeals' rejection of the "inevitable discovery" rationale as a legitimate limitation upon the rule requiring the exclusion of "fruits of the poisonous tree." As this Court has recognized, the exclusionary rule should be applied only "where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348. The "inevitable discovery" doctrine contributes to that principle by denying to the government benefits derived from exploitation of illegal conduct while at the same time minimizing the opportunity for a defendant to receive an undeserved and undesirable windfall. See Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. Crim. L., C. & P.S. 307, 317 (1964); Comment Note, *supra*, 43 A.L.R. 3d at 405. Under this doctrine, the government is afforded the opportunity to " 'remove the taint from otherwise poisoned fruit by establishing that the unlawful act from which it resulted was not a *sine qua non* of its discovery.' " *People* v. *Fitzpatrick*, *supra*, 32 N.Y. 2d at 506-507, 300 N.E. 2d at 142.

The inevitable discovery issue arises in this case if our initial contention—that this evidence was not the fruit of the unlawful entry into the apartment, but had a legitimate, independent source in the untainted warrant—is rejected. The facts of this case establish beyond dispute that the BNDD agents would inevitably have obtained the evidence observed during their illegal entry, even if the unlawful act had

not occurred, and that the government in no way benefited by the unlawful act of the agents. Had they not entered respondent Griffin's apartment when they did, the agents would nevertheless have seized the evidence pursuant to a valid search warrant based upon an affidavit which was being prepared prior to their entry and which contained all the facts necessary to support a finding of probable cause and to justify the entry, the search, and the seizure. No clearer case for application of the "inevitable discovery" doctrine can be imagined.

However, rather than accept the facts before it, the court of appeals hypothesized a situation in which the law enforcement officers only "planned to get a search warrant" (App. A, *infra*, p. 4a) and, on the basis of that contrary-to-fact hypothetical, concluded that, since that kind of assertion by the police "would as a practical matter be beyond judicial review," the "inevitable discovery" doctrine should be rejected (*ibid.*).[5]

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[5] In *People* v. *Fitzpatrick*, *supra*, the rationale of which was rejected by the court in this case, the police legally entered the defendant's home without a warrant, seized and hand-cuffed him, and then advised him of his rights in a manner later found not to be in compliance with *Miranda*. The police then asked him about the gun he used in the hold-up and were told it was in the closet where they had found the defendant; the police seized the weapon. The New York Court of Appeals held that the weapon was admissible in evidence because

> it was entirely fortuitous that the police delayed the search of the immediate area where the defendant was

Last Term this Court declined the opportunity to consider the doctrine of inevitable discovery when it denied certiorari in *Fitzpatrick*, over the dissent of Justice White, concurred in by Justice Douglas. 414 U.S. 1050. Since then, however, one circuit has explicitly accepted the inevitable discovery principle (*Government of the Virgin Islands* v. *Gereau*, C.A. 3, No. 73-1775, decided August 15, 1974) and another has upheld the admissibility of evidence on a similar rationale (*United States* v. *Falley*, 489 F.2d 33, 40-41 (C.A. 2)), while the Sixth Circuit has rejected the doctrine in the instant case. These recent decisions reflect the continuing importance of this issue and its suitability for resolution by this Court.

The *Gereau* case arose from the notorious murder of eight persons at the Fountain Valley Golf Course in St. Croix. The police obtained a statement in

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> discovered until they had begun questioning him * * *. It is quite unreal to suggest that, but for the defendant's admission, the police would not have looked for incriminating evidence in the closet where he had been hiding. * * * Since, then, a search of the closet was inevitable regardless of the defendant's answers to questions put to him beyond its confines, it may not fairly be said that the police "exploited" the "illegality" involved in their interrogation.

People v. *Fitzpatrick*, *supra*, 32 N.Y. 2d at 507, 300 N.E. 2d at 142. While the court of appeals rejected the reasoning of *Fitzpatrick* in part because it found the facts here less compelling, we submit that the activities of the law enforcement officers in this case were more, not less, justifiable than in *Fitzpatrick* and that the facts here more strongly support a finding of inevitability.

violation of *Miranda* from one of the suspects, in which he told them that he had thrown a gun (subsequently identfied as one of the murder weapons) out of the rear window of the house in which he had been arrested. A search revealed the gun on the roof of an adjoining building. The court of appeals held that, although the gun would ordinarily have been excluded as the fruit of the *Miranda* violation, it was admissible under the particular circumstances of the case because the government had demonstrated that the gun would inevitably have been discovered during the course of a saturation search of the area that was then being conducted. The gun was accordingly held not to be the "fruit of the poisonous tree" (slip op. 17).

In *Falley*, the Second Circuit upheld the admissibility of documents obtained from the defendant's customs broker, as well as testimony by the broker, although the broker's name and address were found in an address book seized during an unlawful search of the defendant's home. Finding that an intensive investigation of the defendant's activities had begun prior to the illegal seizure, the court concluded that it "would have been only a question of time before the government by a so-called saturation investigation, or otherwise, would have discovered the broker and the importation documents. Even if the address book had shortened or facilitated the investigation, it did not supply fruit sufficiently poisonous to be fatal" (489 F. 2d at 40). It is unclear whether this decision signals a retreat from the Second Cir-

cuit's earlier apparent rejection of the inevitable discovery principle in *United States* v. *Paroutian*, 299 F. 2d 486. In any event, the issue is recurring with increasing frequency and receiving divergent treatment in both state and federal appellate courts.[6]

Assuming this case is not disposed of on the first ground raised in this petition, it presents the strongest imaginable occasion for application of the inevitable discovery principle, since there is here no need to speculate on whether a warrant would have been obtained or whether the evidence that was present in plain view in the empty apartment would have been discovered upon execution of the warrant. If the court of appeals was correct in refusing to apply the doctrine in the instant case, then it can never have valid application.

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[6] The Fourth, Ninth, and District of Columbia Circuits also appear to have approved the inevitable discovery principle, although not explicitly by that name. See *United States* v. *Seohnlein*, 423 F.2d 1051 (C.A. 4), certiorari denied, 399 U.S. 913; *Warren* v. *Territory of Hawaii*, 119 F.2d 936, 938 (C.A. 9); *Wayne* v. *United States*, 318 F.2d 205, 209 (C.A.D.C.); *Killough* v. *United States*, 336 F.2d 929, 934 (C.A.D.C.). A panel of the Fifth Circuit rejected the doctrine in *United States* v. *Castellana*, 488 F.2d 65, 68, but that case later was reheard by the court sitting *en banc*, which thereupon reversed the decision of the district court to suppress the physical evidence, in an opinion in which the court found it unnecessary to reach the question of "inevitable discovery" (No. 72-2259, decided September 6, 1974).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

ANDREW L. FREY,
Deputy Solicitor General.

PAUL L. FRIEDMAN,
Assistant to the Solicitor General.

OCTOBER 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73-2207

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

THOMAS GRIFFIN and CATHERINE TUCKER, DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Decided and Filed August 21, 1974

Before: PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

PER CURIAM. Federal Narcotics Agents in the City of Detroit who had, by dint of surveillance and two prior lawful arrests, developed probable cause for the search of appellee Griffin's apartment determined to do so. An agent was dispatched to procure a search warrant, while other agents were dispatched to Griffin's apartment to "secure" it. Promptly on their arrival, and after receiving no reply to their

knock, they "secured" the apartment by forceably [sic] entering it, discovering a considerable quantity of narcotics and related paraphernalia in plain view. At this point appellee Tucker came into the apartment and was arrested. Another agent was then dispatched to "expedite" the procurement of a search warrant.

The (now conceded to be) illegal entry took place at approximately 5 p.m. The search warrant was returned to the apartment and at approximately 9 p.m. a thorough search was made. It is conceded by appellant [sic] that the affidavit upon which the search warrant was procured did not contain any facts discovered as a result of the illegal entry.

On these facts the government contended before the District Court that appellees' motion to suppress should be denied because of exigent circumstances. They argued that the narcotics which they had reason to believe were there could readily have been disposed of. But as the District Judge ascertained by questioning, there was no proof that anyone was in the apartment, and on the contrary, they had good reason to believe from prior surveillance of it that nobody was. Holding that there were no exigent circumstances to excuse the warrantless entry, the District Judge granted the motion to suppress evidence.

Before this court the government changed its position. It now argues that the exclusionary rule should not have been applied in this case because the discovery of these materials under the circumstances of this case was inevitable without any reference to the illegal entry. In this regard the government

relies principally upon a recent case in the New York Court of Appeals, *People* v. *Fitzpatrick*, 32 N.Y.2d 499, 300 N.E.2d 139, *cert. denied*, 414 U.S. 1050 (1973), where the court stated:

> "[T]he inevitable discovery factor 'permits the government to remove the taint from otherwise poisoned fruit by establishing that the unlawful act from which it resulted was not a *sine qua non* of its discovery'." *People* v. *Fitzpatrick*, *supra* at 142, *quoting with approval* Maguire, *How to Unpoison the Fruit*, 55 J. Crim. L.C. & P.S. 307, 313.

The District Judge was clearly right in finding that the government had not established exigent circumstances to warrant the forceable entry without search warrant. This case did not involve hot pursuit. Nor did the government present proofs which established its theory that the evdence it sought was in danger of destruction. Hence, we have no need to pass upon what effect, if any, such facts if established, might have upon the normal requirement of a search warrant.[1]

We also believe the government's reliance upon the *Fitzpatrick* case is misplaced. In *Fitzpatrick* the court held that the police had lawfully arrested Fitzpatrick. They had a clear legal right to search the closet where they had arrested Fitzpatrick and they

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[1] *Compare United States* v. *Rubin*, 474 F.2d 262 (3d Cir.), *cert. denied sub nom. Agran* v. *United States*, 414 U.S. 833 (1973). This circuit has never had occasion to pass on the holding of the *Rubin* case.

then had both the present intention and the present capability of doing so.

None of these factors are present in our current fact situation and hence we have no need to determine our attitude toward the rationale of *Fitzpatrick*. Absent "exigent circumstances," the police clearly may not force entry to a home without a search warrant simply because they think they have probable cause to believe evidence of crime may be found therein. *Johnson* v. *United States*, 333 U.S. 10 (1948); *United States* v. *Jeffers*, 342 U.S. 48 (1951); *Vale* v. *Louisiana*, 399 U.S. 30 (1970).

We hold that absent any of the narrowly limited exceptions (*See Katz* v. *United States*, 389 U.S. 347, 357 (1967)) to the search warrant requirement, police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one. The assertion by police (after an illegal entry and after finding evidence of crime) that the discovery was "inevitable" because they planned to get a search warrant and had sent an officer on such a mission, would as a practical matter be beyond judicial review. Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment.

The judgment of the District Court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73-2207

[Filed Aug. 21, 1974, John P. Hehman, Clerk]

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT

vs.

THOMAS GRIFFIN AND CATHERINE TUCKER,
DEFENDANTS-APPELLEES

Before: PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
Clerk

A True Copy.

Attest:

_____

JOHN P. HEHMAN, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal No. 48553

UNITED STATES OF AMERICA, PLAINTIFF

—*vs.*—

THOMAS B. GRIFFIN, III, CATHERINE TUCKER,
DEFENDANTS

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

At a session of said Court, held in the Federal Building, in the City of Detroit, Michigan, on the 3rd day of August, 1973.

PRESENT: HONORABLE LAWRENCE GUBOW,
UNITED STATES DISTRICT JUDGE

A Motion to Suppress the Evidence and Quash the Indictment having been filed on behalf of the defendants, Thomas B. Griffin, III and Catherine Tucker, and the Court having heard testimony and arguments of counsel in open Court, and the Court having further studied briefs and the law applicable to the facts, and the Court having granted the Motion to Suppress from the bench on August 1, 1973.

IT IS HEREBY ORDERED that the Motion to Suppress the Evidence, filed on behalf of the defendants, be and same is hereby granted.

_____

United States District Judge

A TRUE COPY

HENRY R. HANSSEN
Clerk

By _____

Deputy Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 561436 55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-451

UNITED STATES OF AMERICA,
Petitioner,

vs

THOMAS GRIFFIN and CATHERINE TUCKER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR GRIFFIN TUCKER IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-4a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. B, pp. 5a-6a) was entered on August 21, 1974. On September 11, 1974, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including October 19, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Whether the Court of Appeals was correct in holding that the District Judge was clearly right in finding that the Government had not established exigent circumstances to warrant the forceable entry without a search warrant.

2. Whether the Government's reliance upon the "inevitable" theory is proper under the instant facts.

COUNTER-STATEMENT OF FACTS

(Figures in parentheses refer to pages of the transcript)

The defendants are charged in a three-count indictment with unlawful possession of heroin with intent to distribute same in violation of Title 21, United States Code, Section 841(A)(1). Evidence of the offense was seized at an apartment in Detroit, Michigan, at 2017 Burlingame, Apartment 202 (TR-46).

The entry into the apartment was made without benefit of a search warrant and while no one was home (TR-36-53).

Defendant Thomas Griffin was under arrest at a different location prior to the entry, and defendant Catherine Tucker was arrested by agents already in the apartment when she attempted to enter the apartment (TR-26-53).

Defendants filed a motion to suppress the evidence on the grounds that it was seized in violation of the Fourth Amendment (TR-46). The Court below reviewed the motion filed by the defendants and their memorandum, the Government's reply to the motion, and their memorandum of law attached to it, and in addition heard arguments and testimony of one agent.

The Court held in its filed Opinion that ". . . the Government has not met its burden in this case of showing that exigent circumstances did in fact exist to justify the warrentless entry into the apartment and the warrantless search. Griffin and Dudley were both in custody. The officers had it in their control to protect the apartment against entry by any of the other unspecified persons whom they feared might seek to remove or destroy the evidence. The apartment had remained under continuous surveillance from 12:30 to 4:30 [P.M.] or perhaps even later. And in fact, I might point out that in the Affidavit, it says the apartment was under surveillance even at 10:30 that morning. But I am willing to look at this even in a light most favorable to the Government and look at the time factor as being from 12:30 to 4:30 [P.M.]. And there was no reason to believe that anyone had entered the apartment and was in a position to jeopardize the evidence" (TR-52-53).

On appeal the Government abandoned its argument that exigent circumstances justified the warrantless entry and conceded that the entry was illegal. It argued instead that the exclusionary rule should not have been applied in this case because the discovery under the circumstances was inevitable without any reference to the illegal entry.

The Court of Appeals held that in the absence of exigent circumstances, "the police clearly may not force entry to a home without a search warrant simply because they think they have probable cause to believe evidence of [a] crime may be found therein." Also, that the government's reliance upon the Fitzpatrick case was misplaced (Pet. App. 3a, 4a).

ARGUMENT

The Court of Appeals properly held that the District Judge was clearly right in finding that the Government had not established exigent circumstances to warrant the forceable entry without a search warrant. The evidence showed unequivocally that this case did not involve hot pursuit, or, as the Court pointed out, did the Government present proofs which established its theory that the evidence it sought was in danger of destruction.

Under the Government's theory, any agent would have the authority to enter a person's home for the sole purpose of "securing". As to this theory the Court of Appeals properly held that ". . . the assertion by police (after an illegal entry and after finding evidence of crime), that the discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such mission, would as a practical matter, be beyond judicial review." *Johnson* v *United States,* 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367 (1948). See also *United States* v *Jeffers,* 342 U.S. 48, 98 L. Ed. 59, 72 S. Ct. 93 (1951).

In *People* v *Fitzpatrick,* 32 NY 2nd 499, 300 NE 2nd 139 (1973), a principal ~~case relied upon by the~~ Government, the gun in question was found where the defendant was arrested. As stated in that case ". . . it was entirely fortuitous

that the police delayed the search of the immediate area where the defendant was discovered until they had begun questioning him and, as a result, very quickly learned where the gun was located."

As the Court of Appeals stated "None of these factors are present in our current fact situation . . ."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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